No. 85-521

In The
Supreme Court of the United States
October Term, 1985

OTIS R. BOWEN, SECRETARY OF HEALTH AND HUMAN SERVICES, ET AL.,
Appellants,

v.

PUBLIC AGENCIES OPPOSED TO SOCIAL SECURITY ENTRAPMENT, ET AL.,
Appellees.

UNITED STATES OF AMERICA, ET AL.,
Appellants,

v.

STATE OF CALIFORNIA,
Appellee.

On Appeal From The United States District Court
For the Eastern District of California

BRIEF OF APPELLEES

JOHN K. VAN DE KAMP
Attorney General
N. EUGENE HILL
Assistant Attorney General
CHARLES C. KOBAYASHI
Supervising Deputy Attorney General
1515 K Street
P. O. Box 944255
Sacramento, CA 94244-2550
Attorneys for Appellee

COCKLE LAW BRIEF PRINTING CO., (800) 835-7427 Ext. 333

QUESTIONS PRESENTED

Whether Congress may unilaterally abrogate existing contractual right of the State to terminate a voluntary agreement with the federal government concerning participation of State and its local subdivisions in the Social Security System?

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OPINION BELOW

The opinion of the United States District Court for the Eastern District of California, dated May 29, 1985, is reported at 613 F.Supp. 558 (1985) and appears in the Jurisdictional Statement Appendix at pages 1a to 35a.

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JURISDICTION

The judgment of the United States District Court for the Eastern District of California was entered on May 31, 1985. Notice of Appeal was filed on June 27, 1985. On August 19, 1985, Justice Rehnquist extended the time for docketing the appeal through September 25, 1985. The Jurisdictional Statement was filed on that date. Probable jurisdiction was noted on December 2, 1985. (— U.S. —; 106 S.Ct. 521 (1985).) This Court's jurisdiction is invoked by appellants under 28 United States Code section 1252.

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CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

42 United States Code section 418(a)(1) reads in relevant part:

> "The Secretary of Health and Human Services shall, at the request of any State, enter into an agreement with such State for the purpose of extending the insurance system established by this subchapter to services performed by individuals as employees of such State or any political subdivision thereof. Each such agreement shall contain such provisions, not inconsistent with the provisions of this section, as the State may request."

42 United States Code (Supp. I) section 418(g) reads:

> "No agreement under this section may be terminated, either in its entirety or with respect to any coverage group, on or after April 20, 1983."

42 United States Code section 1304 reads:

> "The right to alter, amend, or repeal any provision of this chapter is hereby reserved to the Congress."

The Fifth Amendment to the Constitution reads, in relevant part:

> "[N]or shall private property be taken for public use, without just compensation."

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STATEMENT OF THE CASE

1. Background

The Social Security Act, as originally enacted in 1935, expressly excluded social security coverage for state and local government employees from social security coverage. (42 U.S.C., § 410(a)(7).) "This exclusion was deemed necessary to avoid the constitutional difficulties which would have arisen if social security taxes were levied upon a state." (*Secretary of Health, Education and Welfare v. Snell*, 416 F.2d 840, 841 (5th Cir., 1969).)

Then in 1950 when Congress amended the Act, the general exclusion of state and local government employees from social security coverage was continued in now 42 United States Code section 410(a)(7). But Congress provided that the states may voluntarily obtain social security coverage by entering into agreements with the United States.

Specifically the statute provided:

> "(a)(1) The Secretary of Health, Education, and Welfare shall, at the request of any State, enter into an agreement with such State for the purpose of

extending the insurance system established by this subchapter to services performed by individuals as employees of such State or any political subdivision thereof. Each such agreement shall contain such provisions not inconsistent with the provisions of this section, as the State may request." (42 U.S.C. § 418.)

Thus, with these amendments, states could enroll their employees and those of their political subdivisions in the Old Age, Survivors and Disability Insurance Benefits program of the Social Security Act ("Program"). (42 U.S.C. § 418(a)(1).)

On March 9, 1951, the State of California ("State") and the United States executed an agreement ("Agreement") which provided that the Program would be extended to public employees if and when the State and its eligible public agencies chose to include them.

The Agreement and the Act as they provided on January 1, 1951, permitted the State to withdraw any coverage group, that is, eligible employees of the appellee public agencies upon two years' advance notice to the Secretary. (42 U.S.C. § 418(g).)

To implement its Agreement, the State enacted enabling legislation (Gov. Code §§ 22000-03), pursuant to which Agreement and legislation the State then entered into individual agreements with those public agencies wishing to participate in the Program. Thereafter, the appellee public agencies became enrolled in the Program when the State and the United States modified the state/federal agreement to include them. (42 U.S.C. § 418(c)(4).) The appellee public agencies were required by the State's enabling legislation to make certain "contributions" to the State as payment for their participation. (Gov. Code,

§§ 22551-53.) As permitted by that legislation, the appellee public agencies could withdraw from coverage (and concomitant liability to the State), upon two years' advance notice to the State. (Gov. Code, § 22310.)

Since that time, a series of amendments further broadened the Act's potential coverage of state and local employee. A 1954 amendment to section 418 permitted state and local employees covered by state retirement plans to acquire coverage under a federal-state agreement after an affirmative referendum vote of the employees involved. Social Security Amendments of 1954, chapter 1206, title I, section 101, h(1)-(8), 68 Statutes 1055, 1059. (Codified at 42 U.S.C. § 418(c), (d), (f), (m), (n), as amended). A 1956 amendment allowed certain states to divide their retirement systems into two parts—one composed of positions of members desiring coverage and the other of those opposed to coverage, to treat each part as a separate retirement system for purposes of extending coverage, and to agree to coverage for only the part which favors it. The ability to divide the state system in this way is conditioned upon the state's agreeing that the positions of individuals who join the state system after coverage is extended will thereafter be included in the retirement system coverage group. Social Security Amendments of 1956, chapter 836, title I, section 104(e), 70 Statutes 823, 825, 826. (Codified at 42 U.S.C. § 418(d)(6)(C), as amended.) A 1957 amendment added the State of California to the group of states able to exercise this option. Social Security Amendments of 1957, Public Law No. 85-227, section 1, 71 Statutes 512. (Codified at 42 U.S.C. § 418(d)(6)(C), as amended.)

In April 1983, Congress enacted Public Law No. 98-21, section 103(a) and (b), amending 42 United States Code

section 418(g), to provide that "[n]o agreement under this section may be terminated, either in its entirety or with respect to any coverage group, on or after April 20, 1983." In other words, this amendment prevented any state from withdrawing coverage for any set of its employees, even if a termination notice had been filed and was pending at the time Public Law No. 98-21, section 103(a) and (b) was enacted.

Through April 1983, the State, which had a section 418 Agreement with the Secretary since 1951, had filed termination notices on behalf of approximately 70 of its political subdivisions with approximately 34,000 employees. However, Public Law No. 98-21 prevented the termination from taking place in due course.

The appellees then filed these suits to challenge the amended section 418(g), which prohibited the State and the appellee public agencies from withdrawing from the Program.

The district court decided that the Agreements were contracts and thus properly within the meaning of the Fifth Amendment's Takings Clause. The district court also found that the right to withdraw was a contractual right and went on to conclude, therefore, that Congress could not deprive the State and the appellee public agencies of that right without just compensation. However, the district court said it could not order "just compensation" in the usual sense because of the unique circumstances. Instead, the court declared that amended section 418(g) is void and that the State and its political subdivisions have the lawful right to withdraw from the Program.

2. The Opinion Of The United States District Court

In the district court the appellee State challenged the constitutionality of the amendment which eliminated the provision permitting public agencies to withdraw from the Social Security System. The district court granted summary judgment to appellee State, holding that the public agencies were vested with the contractual right to withdraw from the system and that the right constitutes private property within the meaning of the Just Compensation Clause of the Fifth Amendment, and that this property was taken from them by the United States without the "just compensation" mandated by that claim. The court further found that to award just compensation in this case would frustrate the very purpose in passing the statute. Accordingly, the court declared the statute unconstitutional to the extent that it prevents the appellee State from withdrawing from the Program.

The court noted that the appellants had failed to separate the terms of the Agreement from the terms of the Act itself. The court stressed the fact that "*Both* the Agreement and the statute provided that the State could withdraw after giving two years' advance notice." That is, the State's right to withdraw did not exist solely by virtue of the statute; it existed from the plain terms of the contract, which it had executed with the United States. The court concluded that because of the Fifth Amendment, Congress is simply not free to deprive the State of its contractual right without just compensation.

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SUMMARY OF ARGUMENTS

I. A. The Agreement executed in 1951 between the United States and State was a contract in its true legal sense where both parties exchanged valuable consideration to attain their respective objectives. That contract was a negotiated one and contained such provisions as were agreeable to State. As the district court held, under any definition of a contract, the 1951 Agreement was a contract.

B. The principle is well established that because contractual rights against the government are property interests protected by the Fifth Amendment, Congressional power to abrogate existing government contracts is narrowly circumscribed. In order to avoid the effect of this rule appellants have ignored the Agreement of the parties and sought to analogize the Social Security Program with general, run-of-the-mill federal welfare and disbursement programs. The absence of any express contractual agreement in the case of the latter makes any comparison between the two nonsensical.

C. The termination provision in the contractual Agreement is binding upon the appellants and cannot be legislated away by a later Congressional act. In 1951 when the State entered into the Agreement, section 418 provided that the federal-state agreements may not contain provisions that are inconsistent with the provisions of section 418. The Agreement which was executed in 1951 between the United States and State did not contain any provisions which were inconsistent with section 418. The alleged inconsistency arose with the enactment of the 1983 Amendment. The appellants have been unable to refer

this Court to a single authority that overrules the settled principle of law that when the United States with constitutional authority makes contracts, it has rights and incurs responsibilities similar to those of private contracting parties. Instead, appellants have averted to cases dealing with the sovereign power to tax, rulemaking powers of federal agencies and police powers, none of which help solve the issue before this Court.

II. The real reason for the 1983 Amendment was to solve the financial crisis that had fallen upon the Social Security System. And not only is the law clear that the United States cannot abrogate a contract because of the need for money, the appellants concede that point. For this reason, the appellants' action in unilaterally eliminating the termination right constitutes an impermissible abrogation of the Agreement.

III. The 1983 Amendment effected a taking. The fact that the United States eliminated the expressly bargained for contractual right to withdraw from the System in itself demonstrates that there was a taking. In addition to the drastic nature of the Congressional action, there was an enormous economic impact upon the State. Because of the amendment, the State would be required to administer two programs and to pay for two retirement systems—the Social Security System and Public Employees Retirement System. Finally, the 1983 Amendment caused an obvious interference with investment-backed expectations in that the State is now required to pay social security contributions based on 7.05 percent of each individual's earnings up to $39,600, which is substantially more than the approximately two percent of $3,600 total compensation when the State entered into the

Agreement in 1951. Thus, under even the strictest test, the United States' action constitutes a taking.

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INTRODUCTION

In its opinion, the district court held that apart from the statute, the State has a contractual right to withdraw from the System. The court recognized that Congress may change the statute to prevent withdrawal in the future but that it may not abrogate or repudiate the State's contractual rights. Appellants have argued basically that these agreements are not true contracts in the legal sense but something less than that. But the authorities upon which appellants rely hardly support their positions. The salient point to keep in mind is that we are dealing only with an issue involving express contracts to which the federal government is, by the terms of the contract, one of the parties to the Agreement. Any discussions pertaining to other types of contracts or arrangement or contracts where the federal government is not a party are simply irrelevant.

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ARGUMENT

I. APPELLANTS ARE BOUND BY THEIR CONTRACTUAL RELATIONSHIP WITH THE APPELLEES

A. The United States-California Agreement Was A True Contract

The crux of this case centers around the Agreement that was entered into on March 9, 1951, effective as of January 1, 1951, between "the United States acting through the Federal Security Administration by virtue of the authority vested in him by section 418 of the Social Security Act, as amended" and the State of California by virtue of the authority granted by California statute. In essence, two separate sovereigns, the United States and California, each dominant in its own sphere (*Parker v. Brown*, 317 U.S. 341 (1941); *Redding v. Los Angeles*, 81 Cal.App.2d 888 (1947), app. dism. 334 U.S. 825 (1945), entered into a contractual arrangement.

As the district court noted, the Agreement in question evidences an agreement between the parties that each promises to do certain things and to assume certain obligations. The appellants agree to place State and local public employees in the Social Security System. State agrees to make payments and comply with regulations to carry out the purposes of section 418 of the Act. The State is given the opportunity to modify the Agreement to extend coverage under certain circumstances and also to terminate the Agreement. At the same time, the appellants have the right to terminate if State fails to comply with any provisions of section 418 of the Act or if State fails to make payments when due. Moreover, both

the United States and State repeatedly referred in their Agreement to section 418 of the Act and nothing else. Certainly, if other provisions of the Act were to be incorporated into the Agreement, they could have done so. In the absence of such an incorporation, nothing can be taken by implication against State as the sovereign. (*Singleton v. Bonnisen,* 131 Cal.App.2d 327 (1955).)

A careful examination of the Act will demonstrate further that Congress had intended that the Agreement between the United States and State be a true contractual agreement. For example, the Act provides that each agreement shall contain certain provisions which the contracting state may request so long as they are not inconsistent with the provisions of section 418 ((a)(1)); the agreement shall exclude certain classes of employees if the contracting state requests it ((c)(3)); the United States shall modify the agreement at the contracting state's request to include certain classes of employees ((c)(4)); the agreement shall exclude agricultural workers and students if the contracting state requests it ((c)(5)). These are merely examples; the section is replete with provisions giving the contracting states certain options and rights upon the states' requests.

The Agreement executed by State with the United States was a negotiated contract. This fact was expressly noted by Congress on May 27, 1952 when it was seeking to amend the Act to provide retroactive coverage under the programs for those states which had not yet enacted enabling legislations to enter into agreements. The Senate declared that state statutory authority is required before a state agency can enter into a coverage agreement with the Federal Security Administrator, and that "Such agreements have been negotiated by more than three-fourths of the States. . . . This bill would grant to the States which have not yet negotiated an agreement . . . [additional year] to enter into an agreement." (United States Code Congressional and Administrative News, 82d Cong. 2d sess. 1952, vol. 2, pp. 1774-1775.)

As the above report stated, the United States has negotiated separate agreements with each of the states. There are various provisions in section 418 which provide special treatment for various states by name. (See *e.g.*, subds. (d), (m), (o) and (p).) In addition, there have been uncodified statutory modifications to particular state/United States agreements. (See pp. 302-309 of 1983 edition of 42 United States Code sections 406-1000.)

Further evidence of the existence of a true contract is found in the consideration that was exchanged in the formation of the agreement. State yielded its freedom of not being subjected to the Social Security Act and the obligations that accompanied the Agreement to gain the benefit that accrued from the contract. For the United States, the use of a contract was necessary because it believed that the states could not be subjected to a social security tax.[1]

Thus, the district court correctly held that, "Under any definition of contract, this is a contract. See e.g., *Wood v. United States,* 724 F.2d 1444, 1449 (9th Cir. 1984) (citing *Pennhurst State School & Hospital v. Holderman,* 451 U.S. 1, 17 (1981))." (*Pub. Agencies Opp. To Soc. Sec. Entrapment v. Heckler,* 613 F.Supp. 558, 573 (D.C. Cal. 1985).)

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1. See H.R. Ways and Means Subcommittee Report on Soc. Sec., May 21, 1982, p. 3.

B. California's Rights Under The Agreement Are Contractually Derived And Protected By The Fifth Amendment And Are Not The Products Of Federal Welfare/Disbursement Programs

This Court has reiterated the established rule that because contractual rights against the government are property interests protected by the Fifth Amendment, Congressional power to abrogate existing government contracts is narrowly circumscribed.[2] (*Perry v. United States,* 294 U.S. 330 (1935); *Lynch v. United States,* 292 U.S. 571 (1934); *F.H.A. v. Darlington,* 358 U.S. 84, 97-98 (Harlan, J. dissenting).) This Court in *Perry v. United States, supra,* 294 U.S. 352-353, said:

> "When the United States, with constitutional authority makes contracts, it has rights and incurs responsibilities similar to those of individuals who are parties to such instruments. There is no difference, said the Court in *United States v. Bank of the Metropolis,* 15 Pet. 377, 392, except that the United States cannot be sued without its consent. See, also, the Floyd Acceptances, 7 Wall. 666, 675; *Cooke v. United States,* 91 U.S. 389, 396. In *Lynch v. United States,* 292 U.S. 571, 580, with respect to an attempted abrogation by

2. As early as 1795, Alexander Hamilton had said in his communication to the Senate (3 Hamilton's Works, 518, 519), that:

> " . . . when a government enters into a contract with an individual, it deposes, as to the matter of the contract, its constitutional authority, and exchanges the character of legislator for that of a moral agent, with the same rights and obligations as an individual. Its promises may be justly considered as excepted out of its power to legislate unless in aid of them. It is in theory impossible to reconcile the idea of a promise which obliges, with the power to make a law which can vary the effect of it."

> the act of March 20, 1933 (48 Stat. 8, 11) of certain outstanding war risk insurance policies, which were contracts of the United States, the Court quoted with approval the statement in the *Sinking-Fund Cases, supra,* and said: 'Punctilious fulfillment' of contractual obligations is essential to the maintenance of the credit of public as well as private debtors. No doubt there was in March, 1933, great need of economy. In the administration of all government business economy had become urgent because of lessened revenues and the heavy obligations to be issued in the hope of relieving widespread distress. Congress was free to reduce gratuities deemed excessive. But Congress was without power to reduce expenditures by abrogating contractual obligations of the United States. To abrogate contracts, in the attempt to lessen government expenditure, would be not the practice of economy, but an act of repudiation.' "

This principle was again recognized by this Court in the case upon which appellants heavily rely, namely, *National Railroad Passenger Corp. v. Atchison, T. & S.F. Ry. Co.,* — U.S. —; 105 S.Ct. 1455, fn. 24 (1985):

> "There is a clear distinction between the power of the Congress to control or interdict the contracts of private parties when they interfere with the exercise of its constitutional authority, and the power of the Congress to alter or repudiate the substance of its own engagements. . . . To say that the Congress may withdraw or ignore that pledge is to assume that the Constitution contemplates a vain promise, a pledge having no other sanction than the pleasure and convenience of the pledgor. This Court has given no sanction to such a conception of the obligations of our Government. *Perry v. United States,* 294 U.S. 330, 350-351, 55 S.Ct. 432, 434-435, 79 L.Ed. 912 (1935)."

Ignoring this elementary law of contracts, appellants argue that section 418 agreements are similar to general social welfare programs, particularly in that the adminis-

trative and judicial review procedures "parallel those applicable to most federal programs." Yet appellants do not refer to any single federal program in particular. As a matter of fact, the procedures for administrative and judicial review under the Social Security Act are remarkably similar to those applicable to federal tax matters, which by no means can be called a "federal program."

In support of their position, appellants analogize the Social Security Program to title I, Elementary and Secondary Education Act of 1965 federal grants. (*Bennett v. Kentucky Department of Education,* No. 83-1798 (Mar. 19, 1985), slip. opn.; *Bennett v. New Jersey,* No. 83-2064 (Mar. 19, 1985), slip opn.; *Bell v. New Jersey,* 461 U.S. 773 (1983).) Appellants have selected a number of passages from these three cases and integrated them into their argument that section 418 agreements such as the Agreement here merely "establish the conditions that govern current participation in the System, and describe the ongoing rights and responsibilities of the state and federal governments," and that a "cooperative federal-state program such as the one established by section 418 'cannot be viewed in the same manner as a bilateral contract governing a discrete transaction' (*Bennett v. Kentucky*)." (App. Br., p. 18.) Petitioners further contend that the Social Security Program is nothing more than a "welfare and disbursement program" created by Congress.

But appellants fail to answer the question of the effect an express, written federal-state agreement which exists in this case has upon the so-called welfare and disbursement program. After making its ill conceived analogy with the "welfare and disbursement" programs, appellants cavalierly dismiss the written Agreement with

California by stating that "there is no talismanic significance to the existence of a separate writing signed by a representative of the federal government."[3] (App. Br., p. 21.)

Nor do the appellants discuss the terms of the statute pursuant to which California entered into the section 418 Agreement. As noted previously, that section gives a wide degree of discretion to the states in the negotiation of an agreement for coverage under the Act. The section has a number of provisions which give the states the rights to modify, include or exclude coverage. Even the Agreement that was executed by State expressly gives it the right to modify the contract. Certainly, in view of these rights to modify, include or exclude coverage, the express rights given to certain states specifically identified by name and the voluntary character of the programs, there can be no doubt that the state and political subdivisions' participation in the Program was a contractual one and not as a beneficiary of a federal grant.

Finally, appellants contend that section 418 agreements have none of the indicia of typical contracts. (App. Br., p. 22) Yet, because of the lack of any merit to this claim, appellants have failed to describe what are these typical indicias. As discussed at length above, the section 418 agreements are contracts in the true legal sense. The most telling evidence in this regard is the mutual consid-

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3. This is truly a strange response to the established principle of federal law that "The United States are as much bound by their contracts as are individuals. If they repudiate their obligations, it is as much repudiation with all the wrong and reproach that the term implies, as it would be if the repudiation had been a state or a municipality or a citizen." (Sinking-Fund Cases, 99 U.S. 700 (1878).)

eration that was exchanged in the formation of the contract —United States needed a voluntary assent of the State because it believed it could not compel State to enter into the Program, and the State was able to place certain of its employees and its political subdivisions who would otherwise be excluded under the Program.

C. The Termination Provision Of The Agreement Is Binding Upon The United States

Appellants next argue that because section 418 agreements provide that federal-state agreements may not contain provisions that are "inconsistent with the provisions of this section," and because Congress amended section 418 to eliminate the termination privilege, the termination privilege is now inconsistent with section 418 and, therefore, no longer enforceable. (App. Br., p. 24.) But appellants misread section 418(a)(1), which states in relevant part as follows:

> "Each such agreement shall contain such provisions, not inconsistent with the provisions of this section, as the State may request."

This section clearly states that the agreements shall contain only such provisions, not inconsistent with this section, as the State may request. Here when the Agreement was executed on March 9, 1951, State requested and secured a provision permitting termination which was consistent with the provisions of section 418.[4] Since that time

4. Paragraph (F) of the Agreement provided that "That State, upon giving at least two years' advance notice in writing to the Administrator, may terminate this agreement. . . ."

State has not requested any provisions that are inconsistent with section 418. Instead, it is the United States which has amended section 418 and now seeks to foist the amendment upon State. Thus, appellants argument that "because the termination provision of California's Section 418 agreement is now inconsistent with the amended Section 418, that provision is unenforceable" (App. Br., p. 24) is no argument at all. It leaves unanswered the basic question of whether Congress can abrogate a contractual provision.

Appellants vigorously argue that in order to make the termination provision binding upon the United States, the statute must have expressly provided that only provisions that are inconsistent with the terms of section 418 as it was originally enacted are invalidated. That is absurd. There was no need for such language because the statute provided in 1951 that the agreement will contain such provisions *as the states may request* and that are not inconsistent with section 418. State entered into the Agreement in 1951 and relied and acted upon the United States' offer. In 1951, State requested provisions that were not inconsistent with section 418. It is obvious that State would not request a provision such as the right of termination if it knew that the right was inconsistent with the Act. Thus, the only reasonable reading of section 418(a)(1) in its entirety is that the provisions requested by State and which are not inconsistent with section 418 are those provisions of the agreement and statute as they existed at the time of the execution of the contract. Any other interpretation of section 418(a)(1) would not make sense.

Appellants then argue not only that pursuant to 42 United States Code section 1304 Congress has repealed

the termination right, but also that contractual arrangements remain subject to subsequent legislation. As far as the former is concerned, there is no doubt that Congress can repeal or modify the statute. But as the district court noted:

> "Even if Congress' power to amend the statute is incorporated into the contract, such incorporation does not address the question of whether, when Congress exercises that power, it may deprive the State of its existing contractual rights without compensation. By virtue of the Fifth Amendment, Congress is simply not free to deprive the State of its contractual right without just compensation." (*Pub. Agencies Opp. To Soc. Sec. Entrapment v. Heckler, supra,* 613 F.Supp. at 574.)

The decisions upon which appellants rely hardly support their second contention. Aside from *National Railroad Passenger Corp. v. Atchison T. & S.F. Ry., supra,* — U.S. —; 105 S.Ct. 1441, appellants refer to *Merrion v. Jicarillo Apache Tribe,* 455 U.S. 130 (1982), which is completely inapposite. Appellants have paraphrased totally out of context the following passage from *Jicarillo:*

> "It has thus repeatedly held that '[c]ontractual arrangement remain subject to subsequent legislation by the presiding sovereign . . . unless [t]he sovereign's ability to enact such legislation] "has been specifically surrendered in terms which admit of not other reasonble interpretation."' *Jicarillo Apache Tribe,* 455 U.S. at 147-148 (quoting *City of St. Louis v. United Rys.,* 210 U.S. 266, 280 (1908).)" (App. Br., p. 26.)

Yet, the foregoing paraphrased passage from *Jicarillo* hardly reflects the actual statement that this Court had made, namely:

> "Viewed in this light, the absence of a reference to the tax in the leases themselves hardly impairs the Tribe's authority to impose the tax. Contractual arrangements remain subject to subsequent legislation by the presiding sovereign. See, e.g., Veix v. Sixth Ward Building & Loan Assn. of Newark, 310 US 32, 84 L Ed 1061, 60 S Ct 792 (1940); Home Building & Loan Assn. v. Blaisdell, 290 US 398, 78 L Ed 413, 54 S Ct 231, 88 ALR 1481 (1934). Even where the contract at issue requires payment of a royalty for a license or franchise issued by the governmental entity, the government's power to tax remains unless it 'has been specifically surrendered in terms which admit of no other reasonable interpretation.' St. Louis v. United R. Co., 210 US 266, 280, 52 L Ed 1054, 28 S Ct 630 (1908)." (*Id.* at p. 147-148.)

As is evident from the foregoing, in *Jicarillo* this Court held that the failure to mention severance taxes in the oil leases on tribal lands did not prohibit the Indians from imposing the tax because the Indians always had the sovereign power to tax. The fact that the sovereign retained the power to tax irrespective of the contract's silence on that subject has no bearing upon the rights and obligations that are set forth in the instant parties' Agreement. Thus, the appellants' construction of the passage from *Jicarillo* is a far cry from this Court's actual words and certainly does not stand for the proposition that the United States has unlimited power to rearrange any contractual right and obligation by subsequent legislation.

Appellants continue their attack with references to decisions that are meaningless here. For example, appellants cite *Thorpe v. Housing Authority,* 393 U.S. 268, 279 (1969) for the proposition that a federal agency may impose upon a party with whom it has a contract an additional obligation not contained in the contract when that obli-

gation is imposed under the agency's wholly independent rule making power. But here we are not talking about any rule making power; we are discussing Congress' power to abrogate an essential provision of the contract, a part without which State would not have entered into the contract.

Others such as *New York Rapid Transit Corp. v. City of New York,* 303 U.S. 573 (1938) and *Puget Board Power and Light Co. v. Seattle,* 291 U.S. 619 (1934), deal strictly with local governmental matters and have no bearing on the issue of whether Congress can unilaterally abrogate United States' contract with State.

Appellants then incongruously seek to tie in a state police power case with Congress' alleged power to abrogate United States' contract with State and, in the process, again paraphrase out of context a passage from *Boyd v. Alabama,* 94 U.S. 645, 650 (1876). In *Boyd* this Court did not state that when "one legislature, by [a] contract with an individual, . . . restrain[s] the power of a subsequent legislature to legislate for the public welfare." (App. Br., p. 27.) Instead, what this Court in fact stated is substantially different from the impression that appellants seek to leave here as demonstrated by the statement originally made, namely, that one legislature by a contract with an individual, probably cannot "restrain the power of a subsequent legislature to legislate for the public welfare, and to that end suppress any and all practices tending to corrupt the public morals." There certainly is no public morals issue here.

However, appellants continue with their police power contention at great length:

> "From the earliest days of the Republic, the Court has made it plain that the property clauses of the Constitution—the Takings, Due Process and Contract Clauses—do not require the federal or state governments 'to adhere . . . to contract[s] that surrender [ ] an essential attribute of [their] sovereignty.'" (App. Br., p. 32 et seq.)

In support of this contention appellants discuss a number of cases[5] dealing with a state's police power to abrogate contracts for the sake of public safety. The inappropriateness of appellants' cited cases is evidenced by the singular fact that not one of them involved the United States as a party to the contract. Thus, appellants' reliance on these state police power cases is misplaced. Moreover, their statement that "Against this Background, the Court repeatedly has rejected challenges to legislative action that impaired or abrogated contractual obligations that purported to restrict the government's right to legislate for the public welfare" (App. Br., p. 33) is meaningless inasmuch as the "background" referred to is based on cases concerning state police power. None of those cases involved an express contract entered into by the United States.

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5. *Northern P. Ry. v. Minnesota* ex rel. *Duluth,* 208 U.S. 583, 598 (1908); *Indiana* ex rel. *Anderson v. Brand,* 303 U.S. 95, 108-109 (1938); *City of El Paso v. Simmons,* 379 U.S. 497, 508 (1965); *Pierce Oil Corp. v. City of Hope,* 248 U.S. 498, 501 (1919); *Northern P. Ry., supra,* 208 U.S. at 597; *New Orleans Gas Light Co. v. Drainage Comm'n,* 197 U.S. 453, 460 (1905); *Chicago B. & Q. R.R. v. Nebraska* ex rel. *Omaha,* 170 U.S. 57, 72 (1898); *Butchers' Union Co. v. Crescent City Corp.,* 111 U.S. 746, 751 (1884); *Stone v. Mississippi,* 101 U.S. 814, 817 (1880); *Beer Co. v. Massachusetts,* 97 U.S. 25, 33 (1877). See *United States Trust Co. v. New Jersey,* 431 U.S. at 23 n. 20. Cf. *Horowitz v. United States,* 267 U.S. at 461; *Pennsylvania Hospital v. City of Philadelphia,* 245 U.S. 20, 23-24 (1917); *Goszler v. Georgetown,* 19 U.S. (6 Wheat.) 593, 597-598 (1821).

Curiously, amidst their police power analogies appellants also have interjected two more straw issues which have no place here. First, appellants raise a nonexistent issue with their statement that "Yet there is absolutely nothing in the section 418 agreement at issue here . . . that purports to insulate appellees (or any participating state) from the effects of legislative changes in the Social Security System." (App. Br., p. 28.) Obviously, State is not asserting that section 418 insulates it from any changes in the System. Rather, it is simply contending that unilaterally abrogating a term of an express contract and amending a statute are two separate matters.

Second, appellants discuss social security benefits which are not an issue here and refer to *Flemming v. Nestor*, 363 U.S. 603 (1960) to support their position that:

> "It was doubtless out of an awareness of need for such flexibility that Congress included in the original Act, and since has retained, as clause expressly reserving to it '[t]he right to alter, amend or repeal any provision' of the Act. . . . That provision makes express what is implicit in the institutional needs of the program." (App. Br., p. 29.)

This statement merely reiterated the rule that social security benefits are not contractual and may be altered at any time.[6] Appellants' other cases such as *Hisquierdo v. Hisquierdo*, 439 U.S. 572 (1979) and *Richardson v. Belcher*, 404 U.S. 78 (1981), among others, merely restate the foregoing. Here we are not attempting to resolve questions about social security benefits, their size or the eligibility

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6. Interestingly enough, the Court also said that Congress may not modify the statutory scheme of the Program "free of all constitutional restraint." (*Id.*, at 611.)

for them. Instead, we are talking about the ramifications of section 418 upon the express terms of the Agreement itself.

Thus, it is clear that appellants, after engaging in a prolonged, rambling discussion about welfare and disbursement programs, police powers to protect the public welfare and social security benefits, have been totally unsuccessful in finding legal justification for the United States' abrogation of its express Agreement with the State here.

II. THE 1983 AMENDMENT WAS ENACTED TO RESOLVE A FINANCIAL CRISIS

Inspite of appellants' long discussion setting forth their interpretation of the reasons for the 1983 amendment to the Act, it is undisputed that the principal motivation for the amendment was the financial crisis that the system faced. (*Infra* at p. 27.) Congress was not exercising any "federal police power or some other paramount power" (*Lynch v. United States, supra,* 292 U.S. 579) when it amended the Act in 1983. Congress was merely trying to solve a financial crisis in the System. Moreover, the various motivating factors that appellants refer to as having propelled the 1983 amendment, and particularly their statement that Congress concluded that the " 'voluntary coverage provision can be seen as an anomaly in the context of a basically mandatory system' " (App. Br., p. 41), are undercut by the undisputed fact that Congress has not at-

tempted to require all state and local employees to come under the System's coverage.[7]

On the other hand, in the leading case involving the United States as a party to the contract, this Court made clear that while Congress may impair existing contract rights in the exercise of a paramount government power such as the "War Powers" (U.S. Const., art I, § 8, cl. 11, 12, 14), Congress is without power to reduce its obligations by abrogating contractual obligations of the United States." (*Lynch v. United States, supra,* 292 U.S. 580.) By the same token Congress cannot unilaterally increase the contractual obligation of the states as it has done here by forcing the states to remain in the system.

Other cases dealing squarely with the issue of the abrogation of contractual obligations of the United States have consistently held that the power of the United States to abrogate contracts is indeed limited. Appellants attempt to distinguish these decisions on the basis that they centered on financial or debt matters which cannot be repudiated. But appellants have virtually conceded that their action in withdrawing the termination right comes within the proscription of *Lynch*. For appellants take the position that:

> "*Lynch* thus stands only for the proposition that '*need for money* is no excuse for repudiating contractual obligations.' *United States Trust*, 431 U.S. at 26 n.25. See *National Passenger Rail Corp.*, slip op. 20 n. 24 (characterizing *Lynch* as subjecting the contractual abrogation to special scrutiny because it involved an attempt to 'maintain the credit of public debtors')." (Emphasis added; App. Br., p. 37.)

7. As of the 1983 amendment, public employees of Alaska, the only state to withdraw from the System, Maine, Massachusetts, Nevada and Ohio, and those public employees whose coverages were effectively terminated prior to the 1983 amendment, were and are still not covered by the System.

That is precisely what has happened here in that Congress amended 42 United States Code section 418 because of the need for more money to keep the System adequately funded. As the House of Representatives Committee on Ways and Means stated in its report on the 1983 amendment:

> "The social security system . . . is facing under current law a major cash shortfall over the next decade. . . . If nothing more were done than to extend interfund borrowing authority, the three combined funds (OASDHI) would be unable to pay benefits on time beginning in the spring of 1984. The critical shortfall lasts through 1990. . . .
>
> "The short-term financing crisis for the OASI program is the result of two factors: (1) five years of recurring cycles of high inflation coupled with low productivity and high unemployment; and (2) insufficient reserve levels provided by the tax increases and benefit reforms enacted in 1977. . . .
>
> "Titles I, II and III of your Committee's bill are therefore intended to restore the financial soundness of the old age and survivors' and disability insurance trust funds, both in the short-term and over the entire seventy-five year forecasting period." (H.R. Report on Soc. Sec. Amend. of 1983, Mar. 4, 1983, pp. 11-13.)

Thus, Congress has done exactly what appellants admit that it cannot do, namely, repudiate an existing contract because of the need for more money.

Finally, in an effort to direct this Court's attention away from the real issue of whether Congress can abrogate the express terms of a contract appellants have raised

again the illusory issue discussed above. In this regard appellants state:

> "If Section 418 agreements are contracts that must be construed to foreclose the federal government from mandatorily enrolling participating states in the System, they plainly fall within the first category of contracts outlined above—those that create no vested rights because they purport to deny the government the authority to take action essential to the general welfare. Section 418 agreements are not 'purely financial' arrangement like revenue bonds (*United States Trust,* 431 U.S. at 25.) Instead, they are the mechanism that Congress used to provide welfare and insurance protection to millions of workers. If the agreements foreclose Congress from legislating in this area, and thus from protecting a large portion of the workforce against 'the risks and uncertainties of advanced industrial society' (H.R. Comm. Print 97-32, at 7), they plainly surrender—impermissibly—an essential attribute of federal sovereignty."

The truth is that Congress probably can mandatorily enroll all the states in the System. But if that is Congress' desire, then it must do so by separate legislation. Appellee state is not arguing that Congress does not have the power to impose a mandatory coverage system. Appellee simply is stating that the Congress must take these steps in proper sequence, namely, first abide by the terms of the agreements with respect to the right to terminate, and then pass legislation requiring all states and their political subdivisions to become members of the System.

III. THE 1983 AMENDMENT EFFECTED A TAKING WITHIN THE MEANING OF THE FIFTH AMENDMENT

As discussed above, section 418 Agreements are property that was taken by Congress when it enacted the 1983 Amendment. Such agreements also are property that is entitled to constitutional protection within the meaning of the Taking Clause of the Fifth Amendment.

Appellants contend that since "government regulation —by definition—involves the adjustment of rights for the public good" (*Andrus v. Allurd,* 444 U.S. 51, 65 (1979)), there was no taking here. Appellants concede that there are no fixed formulas to determine when a regulation crosses the permissible line and effects a taking. Although this Court pointed out that the resolution of the takings issue in each case "ultimately calls as much for the exercise of judgment as for the application of logic" (*Id.*), it has also examined three specific considerations at times to resolve the issue.

In this case the appellants rely heavily on the alleged absence of these three considerations in support of their position that there was no taking. These three considerations are the character of the government action, its economic impact and its interference with reasonable investment-backed expectations. (*Prune Yard Shopping Center v. Robbins,* 447 U.S. 74, 83 (1980); *Penn Central Transportation Co. v. New York City,* 438 U.S. 104, 124 (1978).) Here the character of the 1983 Amendment clearly evidences a taking. By a stroke of the pen Congress eliminated a significant right that State had acquired by an express contract. Although the appellants argue that to find takings in this case would be tantamount to regulation

by purchase, they forget that the State's right in this case was acquired through negotiation as part of the consideration for the contract.

There can be no doubt that the 1983 Amendment had an enormous economic impact on the State. Because the State now cannot withdraw from the System, it must continue to fund at least two types of retirement plans for their employees—Social Security System and the State's Public Employees Retirement System. This drain on the State's resource is extremely painful and will become even more exacerbating if the Gramm-Rudman Act eventually is ruled to be valid.

Finally, the 1983 Amendment obviously caused an impermissible interference with "reasonable investment-backed expectations." When the State first entered into the Program pursuant to the Agreement and enabling State legislation, the rate of contribution was miniscule in comparison to 1985's rate of 7.05 percent of total compensation to a maximum of $39,600. Even in today's inflated economy an annual obligation of $2,792 for a person in the maximum salary level is far removed from the approximately $100 that was required in 1951. Thus, even under the three considerations test, the 1983 Amendment constitutes a clear taking.

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CONCLUSION

We respectfully urge that the judgment of the district court be affirmed.

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Respectfully submitted,

JOHN K. VAN DE KAMP
Attorney General of the
State of California

N. EUGENE HILL
Senior Assistant Attorney
General

CHARLES C. KOBAYASHI
Supervising Deputy Attorney
General

Attorneys for Appellee